IN THE UNITED STATE BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DONALD RAY JONES D/B/A EXPRESS OIL COMPANY Debtor	§ § § §	CASE NO. 09-60167-H2-7
	§	
W. STEVE SMITH, TRUSTEE OF THE ESTATES OF DONALD RAY JONES D/B/A EXPRESS OIL COMPANY Plaintiff	§ § § § § §	
	§	
VS.	§	ADVERSARY NO. 10-06006
	§	
WEATHERFORD INTERNATIONAL L.P. Defendant	§ § § §	

DEFENDANT WEATHERFORD INTERNATIONAL L.P.'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

TO THE HONORABLE JUDGE OF SAID COURT:

THIS MOTION SEEKS AN ORDER THAT MAY ADVERSELY AFFECT YOU. IF YOU OPPOSE THE MOTION, YOU SHOULD IMMEDIATELY CONTACT THE MOVING PARTY TO RESOLVE THE DISPUTE. IF YOU AND THE MOVING PARTY CANNOT AGREE, YOU MUST FILE A RESPONSE AND SEND A COPY TO THE MOVING PARTY. YOU MUST FILE AND SERVE YOUR RESPONSE WITHIN 21 DAYS OF THE DATE THIS WAS SERVED ON YOU. YOUR RESPONSE MUST STATE WHY THE MOTION SHOULD NOT BE GRANTED. IF YOU DO NOT FILE A TIMELY RESPONSE, THE RELIEF MAY BE GRANTED WITHOUT FURTHER NOTICE TO YOU. IF YOU OPPOSE THE MOTION AND HAVE NOT REACHED AN AGREEMENT, YOU MUST ATTEND THE HEARING. UNLESS THE PARTIES AGREE OTHERWISE, THE COURT MAY CONSIDER EVIDENCE AT THE HEARING AND MAY DECIDE THE MOTION AT THE HEARING.

REPRESENTED PARTIES SHOULD ACT THROUGH THEIR ATTORNEY.

Defendant WEATHERFORD INTERNATIONAL L.P. (hereinafter “Weatherford”) hereby files this motion to dismiss for failure to state a claim and would respectfully show to the Court the following:

1. The amended complaint admits that the Weatherford has a final judgment as to the amount and validity of its claim. See Amd. Compl. at paragraph 2.
2. Therefore, even if all of the factual allegations are true (they are not, but even if they were) the suit is barred by *res judicata*.
3. The doctrine of *res judicata* bars subsequent litigation in the presence of four elements: (i) the parties are identical or in privity, (ii) the judgment in the prior action was rendered by a court of competent jurisdiction, (iii) the prior action was concluded by a final judgment on the merits, and (iv) the same claim or cause of action was involved in both actions. *Petro Hunt LLC v. United States*, 365 F.3d 385, 395 (5th Cir. 2004).
4. All of the elements of *res judicata* are present.
5. When a complaint pleads allegations that support an affirmative defense (such as *res judicata*) then dismissal for failure to state claim is appropriate. *Aldrich v. McCulloch Props., Inc.*, 627 F.2d 1036, 1041 n.4 (10th Cir. 1980)(although a statute of limitations bar is an affirmative defense, it may be resolved on a Rule 12(b)(6) motion to dismiss "when the dates given in the complaint make clear that the right sued upon has been extinguished."); *Gray v. Evercore Restructuring L.L.C.*, 544 F.3d 320, 324 (1st Cir. Mass. 2008)(“Where a court grants a Rule 12(b)(6) or Rule 12(c)

motion based on an affirmative defense, the facts establishing that defense must: (1) be "definitively ascertainable from the complaint and other allowable sources of information," and (2) "suffice to establish the affirmative defense with certitude.")

Prayer

Weatherford prays that the Court dismiss the above-styled adversary proceeding for failure to state a claim for which relief can be granted.

Respectfully Submitted,

HOOVER SLOVACEK LLP

By: *__/s/ Annie E. Catmull__________________*

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ATTORNEYS FOR WEATHERFORD
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CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2010, a true and correct copy of foregoing document was served via the Court's ECF notification system at ssmith@mcfall-law.com

________/s/ Annie E. Catmull__________________
ANNIE E. CATMULL